Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

DEPUTY PAUL THRASH,

Petitioner/Appellee,

v.

HERBERT GULLIFORD,

Respondent/Appellant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Ninth Circuit -- unlike other circuits -- require a police officer to cross appeal before he can assert qualified immunity as an alternative ground for affirming his defense verdict in a 42 USC §1983 claim?

2. In determining when First Amendment rights are "clearly established" for qualified immunity purposes, should federal courts give full faith and credit to precedent of the officer's home state that upholds similar arrests against similar constitutional challenges?

3. May the Ninth Circuit, under the guise of the "law of the case" and by preempting a jury's fact finding role, direct liability against a police officer because the arrestee accompanied his unlawful act with First Amendment speech?

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I. REPORTS OF OPINIONS

The Ninth Circuit's first opinion in this case is published at Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998). The Ninth Circuit's second opinion is unofficially published at Gulliford v. Thrash, 2001 WL 427285 (9th Cir. Apr. 25, 2001).

II. JURISDICTION

The first opinion in this case by a divided Ninth Circuit Court of Appeals was entered on February 27, 1998, see App. A, and rehearing was denied in another split decision on April 9, 1998. See App. B. After retrial the second opinion of another divided Ninth Circuit Court of Appeals was entered on April 25, 2001, see App. C, and rehearing was denied in another split decision on June 14, 2001. See App. D. This Court has jurisdiction under 28 USC §1254 (1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS (APPENDIX W)

A. U.S. Constitution, Article VI, clause 2
B. U.S. Constitutional Amendment I
C. U.S. Constitutional Amendment IV
D. 28 USC §1738
E. 42 USC §1983

D. RCW 9A.84.020

E. RCW 9A.76.020(1)

IV. STATEMENT OF THE CASE

On the evening of September 6, 1992, plaintiff Herbert Gulliford was part of a beach party crowd whose members repeatedly that evening had threatened both citizens and officials with violence. See Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir.), cert. denied, 525 U.S. 828 (1998). In response to numerous calls for help, three Pierce County deputy sheriffs and a Washington State trooper arrived at the isolated and darkened scene of the threats to disperse the crowd and locate those who had committed the felony of threatening a fire fighter. However, when the officers repeatedly told the larger crowd to go home, the crowd did not disperse. Id.; United States v. Poocha, 2001 WL 880840, at * 3 (9th Cir. Aug. 7, 2001)(explaining that in Gulliford "police told the group to go home, but the crowd did not disperse.") Rather, plaintiff from the midst of the crowd made clear his refusal to disperse and apparently called for the crowd to do likewise by yelling: "why

don't you get the fuck off the island" and for the officers instead to "hop on the ferry and go back." Plaintiff was arrested by Pierce County Sheriff's Deputy Paul Thrash. Id.

Alleging jurisdiction under 28 USC §1331 and §1343, plaintiff thereafter filed in the Western District of Washington a 42 USC §1983 claim against Deputy Thrash and others for unlawful arrest and excessive force. During the three week trial defendants asserted, among other things, that there was probable cause to arrest for obstructing by plaintiff's failure to disperse and threatening behavior. See App. E; App. F at 3-4. The jury returned a defense verdict on all issues. Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir. 1998). Plaintiff's motion for a new trial or judgment not withstanding the verdict was denied. App. G. Plaintiff then appealed to the Ninth Circuit Court of Appeals which unanimously affirmed the defense verdict on excessive force but in a split decision reversed the jury's verdict in favor of Deputy Thrash on unlawful arrest and remanded that issue for retrial. 136 F.3d at 1351. In so ruling,

two of the panel concluded that a district court instruction had allowed the jury to also find probable cause to arrest on the basis of "fighting words" which the majority concluded were not present. The majority further held Deputy Thrash could not raise qualified immunity on appeal as an additional ground to affirm the jury's verdict because -- though he had prevailed against plaintiff's claims in the District Court -- he "neglects to explain why it did not cross appeal on this issue . . . ." 136 F.3d at 1351.

The third member of the panel dissented, noting plaintiff had not raised that instructional objection throughout the trial, the district court did not know plaintiff's asserted objection to its instruction and, therefore, the "pointless formality exception" to FRCP 51 did not excuse plaintiff's failure to make that objection at trial. The dissent both "would affirm the judgment of the district court" and "not reach the question of qualified immunity . . . ." Id. at 1351 (O'Scannlain, J., dissenting).

Upon retrial of plaintiff's claims of unlawful arrest and

retaliation for the exercise of free speech, evidence again was presented and a second jury instructed on whether plaintiff's failure to disperse or his obstruction by use of threat or incitement of the crowd to violence were criminal acts accompanying his words. See App. H. This second jury again awarded a defense verdict. See Gulliford v. Thrash, 2001 WL 427285, at * 1 (9th Cir. Apr. 25, 2001). Plaintiff again moved for a directed verdict which again was denied. Id. Plaintiff again appealed and the Ninth Circuit again reversed on the ground one of the district court's instructions had in passing again used the undefined term "fighting words." Id. See also App. L at 4-15. The same majority that had reversed the first jury verdict further ruled that liability should have been directed against the deputy because "the district judge in the second trial abused his discretion" by instructing the jury to consider if there was probable cause to arrest for failure to disperse because that instruction had not been used in the first trial and "no reasonable and properly instructed jury" could find probable cause for ob-

structing an officer. Id. at *2-3. Accordingly, the majority remanded only for a "trial on the issue of damages." Id. at * 3.

The new panel member -- like the third member of the earlier panel -- dissented, noting the jury in the first trial had been allowed to consider plaintiff's failure to disperse as a means of obstructing and that from the record "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ." Id. at *3 (Fisher, J., dissenting). Over the dissent's further objection, rehearing was denied. App. D.

V. ARGUMENT

The decisions by two Ninth Circuit judges -- in conflict with the third panel member and with two separate and independent juries as well as two separate and independent district court judges -- orders a directed verdict against Deputy Thrash for unlawful arrest and precludes the jury from deciding any issue other than the amount of plaintiff's damages. In so ruling, the majority is not only "in conflict with the decision of another United States court of appeals on the same important matter," not

only "has decided an important federal question in a way that conflicts with relevant decisions of this Court," but "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." See S.Ct. Rules 10 (a) and 10 (c).

1. Ninth Circuit Conflicts With Other Circuits By Requiring Officer Prevailing At Trial To File A Cross Appeal Or Be Held To Waive Qualified Immunity As Ground For Affirming His Verdict

In reversing the first defense verdict, the majority held Deputy Thrash had waived his right to assert qualified immunity as a ground for affirming the judgment because he "neglects to explain why [he] did not cross appeal on this issue from the district court's denial of [his] motion seeking qualified immunity" and an "appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." Gulliford v. Pierce County, 136 F.3d 1345, 1351 (9th Cir. 1998). This ruling on federal appellate procedure in civil rights cases directly conflicts with relevant decisions of this Court and other circuit courts of appeal.

This Court repeatedly has held as an "inveterate and certain" rule, Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976), that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Id. (quoting United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087, 44 S.Ct. 560 (1924)). See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 325 n. 3, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434, 84 L.Ed. 849, 60 S.Ct. 670 (1940). Deputy Thrash prevailed on all plaintiff's claims at trial so that his assertion of qualified immunity on appeal was not made "with a view toward enlarging [his] own rights" but to affirm the jury's verdict on a ground previously raised and supported by the record.

In not applying this Court's "inveterate and certain" rule

to a police officer's assertion of qualified immunity as a way to affirm a favorable jury verdict, the Ninth Circuit also is in direct conflict with that rule's application by other circuits under identical circumstances. In Powell v. Schriver, 175 F.3d 107, 113 (2nd Cir. 1999) an officer likewise asserted qualified immunity on appeal as an alternative ground for affirming his defense verdict. Plaintiff however argued, as the Ninth Circuit held here, that such had been waived by the defendant's failure to file a cross appeal of the denial of immunity by the District Court. Citing this Court's decision in United States v. American Railway Express Co. and its own precedent, the Second Circuit ruled plaintiff's argument "is meritless" because the "judgment entered was entirely in [the officer's] favor," and an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." 175 F.3d at 113. Similarly, in Sims v. Mulchahy, 902 F.2d 524, 545 (7th Cir.), cert.

denied, 498 U.S. 897 (1990), when a prevailing officer cross appealed to raise qualified immunity as an additional ground to affirm his jury verdict, he was harshly criticized by the Seventh Circuit for filing an "improper and unnecessary" appeal because "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary." Id. (quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987), cert. dismissed 485 U.S. 901 (1988)).

The Ninth Circuit decision in Gulliford v. Pierce County is irreconcilable with both this Court's decisions as well as with that of other circuits. See 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3904 n. 14 (supp. 2001) (in Gulliford "[i]t would have been better to put aside the cross-appeal observation.") Accordingly, a writ of certiorari is appropriate because the Ninth Circuit not only "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but "has decided an important question in a way that conflicts with relevant decisions of

this Court." S.Ct. Rule 10(a) and (c).

2. In Determining When Rights Are "Clearly Established" For Purposes Of Qualified Immunity, The Ninth Circuit Ignored Prior Precedent Including That Of The Officer's Home State

After ruling that qualified immunity had been waived, the majority in the first appeal summarily stated that in any case a "reasonable officer should have known that [plaintiff] was simply exercising" the "right of individuals in that community to question their government and the role of police." 136 F.3d at 1251 (citing Mackinney v. Nielsen, 69 F.2d 1002, 1007 (9th Cir. 1995)). In so doing, the Ninth Circuit majority committed the same error this Court identified in Anderson v. Creighton, 483 U.S. 635, 640-41, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987):

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right [defendant] was alleged to have violated ... was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause . . . .

(Emphasis added). See also Saucier v. Katz, 531 U.S. 991, 150

L.Ed.2d 272, 121 S.Ct. 2151, 2156 (2001)("This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . .").

Further, a "court engaging in review of a qualified immunity judgment should" also "use its 'full knowledge of its own [and other relevant] precedents.'" Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994)(quoting Davis v. Sherer, 468 U.S. 183, 192 n. 9, 104 S.Ct. 3012, 82 L. Ed.2d 139 (1984)(alteration in original)). See also Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990)(to overcome qualified immunity there must be "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.")(emphasis added). The Ninth Circuit's summary rejection of qualified immunity failed to fairly address relevent precedents of this Court, the Ninth Circuit and other Circuits that address the application of the constitutional issues in question in the context of circumstances similar to that which confronted Deputy

Thrash. See, e.g., Houston v. Hill, 482 U.S. 451, 462 n. 11, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987)("a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt[s] to engage the officer in conversation while the officer is directing traffic" or who "run[s] beside [an officer pursuing a felon] in a public street shouting at the officer."); United States v. Brice, 926 F.2d 925, 931 (9th Cir. 1991)(where citizen consistently refused to comply with official directions and instead asked "why," his arrest was upheld against First Amendment challenge because his conduct contained both speech and non-speech elements); Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir. 1994)(where plaintiff was arrested when he said "I can't believe what is happening" after being ordered to leave a party, failure to disperse and not the chilling of free speech was the cause of his arrest); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2nd Cir. 1992)(claim of retaliation for exercising free speech rejected where there was probable cause to believe crime had been committed).

More immediate to a state police officer, the Ninth Circuit majority ignored Deputy Thrash's own state's prior decision that had been decided under similar facts and similar constitutional challenges. Such state authority would have led any reasonable Washington State police officer to believe plaintiff's conduct of remaining and communicating both his intent to remain as well as his intent the deputies instead should leave, to be "acts which accompanied his words" for which he could be arrested. See State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421, rev. denied, 100 Wn.2d 1014 (1983)(First Amendment is not implicated by an arrest for obstructing under RCW 9A.76.020 of a person who attempts to talk to officers about arrest of another party goer after being told to leave). Hence any Washington police officer would believe Gulliford could be constitutionally arrested for failing to disperse and for obstructing their efforts to disperse the crowd and arrest a felon.

However the majority here declined even to discuss the Washington precedent cited it, presumably because the Ninth

Circuit only considers state law "in the absence of" what it considers "binding precedent." See Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). See also Ward v. County of San Diego, 791 F. 2d 1329, 1333 (9th Cir. 1986), cert. denied 483 U.S. 1020 (1987) ("the pronouncement of [the officer's state court] on a constitutional issue does not necessarily shield a government official from liability.") Such ignores that Washington judicial precedent on federal constitutional law is just as authoritative as Ninth Circuit law and just as "binding" on Deputy Thrash. See ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed. 2d 696 (1989)(state courts "possess the authority ... to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 376, 113 S. Ct. 838, 122 L. Ed.2d 180 (1993)(THOMAS, J., concurring) ("neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") See also Ari-

zonans for Official English v. Arizona, 520 U.S. 43, 58 n. 11, 137 L.Ed.2d 170, 117 S.Ct. 1055 (1997)(Ninth Circuit's belief state courts are not "coordinate and coequal with the lower federal courts on matters of federal law" deemed "remarkable."); U.S. Const., Art. VI, cl. 2 ("the Judges in every State shall be bound" by the "Constitution, and the Laws of the United States"); 28 USC §1738 ("judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . .")

Under the Ninth Circuit's forum centric approach the same action brought in state court would likewise ignore federal circuit court precedent and inconsistently consider only what law was "clearly established" by its own "binding" state court decisions. As one authority observes, if an officer's state precedent interpreting federal law is not considered in deciding what is "clearly established," regardless of which court plaintiff chooses to bring suit, forum shopping will -- as here -- decide the

outcome:

> [I]f federal and state decisional law with respect to a substantive constitutional question differs significantly, one strongly supporting the existence of the clearly established law that underlies the qualified immunity issue and the other strongly opposing it, the choice of forum is likely to be outcome derminative on the liability question. In such cases, plaintiffs and defendants would be especially well advised to select (and fight for) the forum whose law would favor their respective positions on the question of immunity. But whether such a system provides a coherent and sensible scheme for the adjudication of civil rights and liberties claims may be subject to question.

Richard B. Saphire, Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law, 35 Ariz. L. Rev. 621, 624 (1993). Finally, the Ninth Circuit's lack of full faith and credit to state decisions conflicts with the very rationale for qualified immunity because, when the substantive law changes depending on whether plaintiff files in state or federal court, state police cannot "reasonably anticipate when their conduct may give rise to liability for damages . . . ." C.f. Davis, 468 U.S. at 195.

This Court has never specifically addressed the role of state court precedent on federal questions in analyzing whether a right is "clearly established" for purposes of qualified immunity. See e.g. Harlow v. Fitzgerald, 457 U.S. 800, 819 n. 32, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)("we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."); Boreen v. Christensen, 280 Mont. 378, 930 P.2d 67, 71 (1996)("The United States Supreme Court has not established the requisite hierarchy of law from which to determine whether a right is clearly established."); Guffy v. Whatt, 18 F.3d 869, 872 (10th Cir. 1994)("While defendant contends that state decisional law is relevant to the qualified immunity inquiry, the role of state law remains unsettled."); Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988)("we have had no specific Supreme Court guidance in deciding when an issue becomes clearly established."); Saphire, 35 Ariz. L. Rev. at 627 (the Supreme Court has not "provided clear standards for de-

termining where courts should look to determine whether the rights asserted by the section 1983 plaintiff were clearly established" and in its absence "lower courts have not been uniform in their approaches to the issue."); Richard H. Fallon & Daniel J. Meltzer, New Law, Non-Retroactiviety, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1751 (1991)(years after Harlow the question of where to look for clearly established law "remains unresolved.") But c.f. O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)(prior to formulation of "clearly established" test circuit court was reversed because it "did not consider ... [defendant's] claimed reliance on state law" for purposes of qualified immunity). Accordingly, the Ninth Circuit's refusal to consider the effect of state court precedent in determining what case law controls whether a right is "clearly established," makes certiorari appropriate to finally decide the question of a state officer's liability where he relies on his state's decisional law for the determination of federal constitutional rights. S.Ct. Rule 10 (c).

3. Under The Guise Of The "Law Of The Case" And By Preempting A Jury's Fact Finding Role, The Ninth Circuit Improperly Directed Liability Because Plaintiff's Unlawful Act Was Accompanied By First Amendment Speech

In reversing the second jury verdict, the same majority as in the first appeal held that a verdict should have been directed against Deputy Thrash because the second jury should not have been allowed to decide if there was probable cause to arrest for failure to disperse and no reasonable jury could have found Gulliford obstructed the officers. See Gulliford v. Thrash, 2001 WL 427285 at *2 . This decision, which essentially holds probable cause to arrest for obstructing an officer does not exist if accompanied by First Amendment speech, so far departs "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S.Ct. Rule 10(a).

Though the dissent noted "probable cause to arrest could properly have been found based on Gulliford's failure to disperse," 2001 WL 427285 at *3; see also RCW 9A.84.020; Tatro, 41 F.3d at 18, the majority refused to consider the issue claiming

the judge in the first trial somehow excluded that issue from the first jury[1] and Deputy Thrash on appeal supposedly "does not justify the change in instructions by alleging any ... exception[]" to the "law of the case."[2] Id. at *1. Though such mistaken

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[1] As the dissent however noted, the first trial court "never ruled that the jury could not consider failure to disperse as a ground for probable cause" but "[t]o the contrary, . . . stated that there was a material issue of fact regarding whether Thrash had probable cause to arrest Gulliford based on failure to disperse and allowed both lay and expert testimony on the issue of failure to disperse." See 2001 WL 427285 at * 3 (Fisher, J., dissenting). See also App. E; App. I; App. J; App. K. Rather, as the dissent went on to observe, "[i]nstead of specifically instructing the jury on failure to disperse" the first district court "indicated that failure to disperse was arguable under the more general obstruction instruction, stating: 'Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in different ways, obviously, than counsel suggested, but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions.'" See 2001 WL 427285 at * 3 (Fisher, J., dissenting). See also App. F at 4. Indeed, when plaintiff asked that first trial judge for a new trial after the first verdict on the express ground there was insufficient evidence to find criminal conduct, that same judge - again confirmed the "issues raised by Plaintiff were fully discussed and considered at trial." App. G, p. 1.

[2] On the contrary, Deputy Thrash's appellee brief to the Ninth Circuit expressly asserted:

> [A]pplication of the "law of the case" doctrine ... does not apply to decisions that are "erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618 n. 8, 75 L.Ed.2d 318, 103 S.Ct. 1382 (1983); United States v. Pend Oreille County Public Utility Dist. No. 1, 135 F.3d 602, 608 (9th Cir. 1998); In Re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996). . . . . Here there was more than sufficient evidence in the first trial, [record citations omitted] --

conclusions only can be characterized as an outcome oriented abuse of appellate authority, see footnotes 1-2 supra.,[3] plaintiff's

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> as well as in the second, [record citations omitted] -- to support a jury in finding the crime of failure to disperse . . . . Plaintiff's "wooden" application of the law of the case is founded on a decision that was never made, and that if made would have been "erroneous" and "would work a manifest injustice."

App. L at 2-4 (emphasis added). As the dissent noted, "probable cause to arrest could properly have been found based on Gulliford's failure to disperse." 2001 WL 427285 at *3; see also Tatro, 41 F.3d at 18. Accordingly, preventing the jury from deciding probable cause for failure to disperse obviously would be "erroneous and would work a manifest injustice" and comes within the exception to the "law of the case" expressly asserted by Deputy Thrash. See 460 U.S. at 618 n. 8.

[3] Indeed, the issue was not properly before the Ninth Circuit to begin with because Deputy Thrash had noted that plaintiff again had failed to object at the second trial to the "failure to disperse" instruction on the ground the instruction violated the "law of the case." App. L at 1-2 n 7; App. H at p. 3; App. U; App. V. See also Coastal Distributing Co. v. NGK Spark Plug Co., 779 F.2d 1033, 1039 (5th Cir. 1986); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir.), cert denied, 369 U.S. 819 (1962). The majority made no claim in its second reversal, as it erroneously had in the first reversal over the dissent's objection, that the "pointless formality" exception somehow again excused plaintiff's failure to properly object in the second trial. See 136 F.3d at 1352-53 (O'Scannlain, dissenting)(plaintiff at the first trial objected only to the absence of a separate First Amendment claim and not, as he later asserted on appeal, that the court's instruction failed to state the First Amendment prevents verbal opposition from constituting probable cause under the Fourth Amendment). See also App. F at 1-3, 10; Gosvenor Properties Ltd v. Southmark Corp., 896 F.2d 1149, 1152 (9th Cir. 1990)("remarks made by counsel in chambers . . . and mere submission of proposed instructions did not clearly show that the issue was focused before the court."); Elliott v. S.D. Warren Co., 134 F.3d 1 (1st Cir. 1998)(FRCP 51 is mandatory and "an objection raised emphatically in chambers before delivery of the charge does not, without more, preserve for review issues relating to the charge").

failure to leave when ordered nevertheless also properly was considered by the jury in determining the crime of "obstructing" under RCW 9A.76.020. See 2001 WL 427285 at *3 (Fisher, J., dissenting) ("although the court did not give a specific failure to disperse instruction in the first trial, the jury was permitted to consider failure to disperse as a means of committing obstruction.") See also Hill, 482 U.S. at 462 n. 11; Lalonde, 35 Wn.App. at 61-62. Plaintiff's call at a tense moment from the midst of a larger darkened crowd -- while officers were attempting to disperse it and arrest a felon -- for the officers instead to leave, clarified that plaintiff meant to obstruct officers in their lawful efforts and was a further ground for finding a violation of RCW 9A.76.020. See App. M at 5-8; App. N at 1-6; App. O; App. P at 1-11; App. Q at 5; App. R.

Having improperly refused to consider the existence of probable cause either for "failure to disperse" or for "obstructing an officer" by failing to disperse, the majority then improperly assumed the role of the jury and rejected the possibility that a

"reasonable and properly instructed jury" also "could determine that Gulliford's words constituted an incitement to breach the peace as a theory of obstuction" or "find these words to be a true threat" because supposedly "Thrash offers only Gulliford's words" as a basis for probable cause. See 2001 WL 427285 at *2. Such a holding not only disregards the actual record[4] and well settled procedural rules on when a directed verdict is appropriate,[5] but makes the Ninth Circuit rather than the jury the ulti-

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[4] Even improperly ignoring -- as did the Ninth Circuit -- evidence that plaintiff refused to leave when lawfully ordered and that his "words" confirmed that intent, appellee's brief identified how "the record is replete with testimony that officials had been threatened that very evening by members of this same crowd and that the situation was tense and there was concern for the deputies' safety from the crowd when plaintiff called out from the midst of that same crowd for the deputies instead to leave, [App. M at 1-5, 8-18; App. N at 7; App. P at 14; App. Q; App. R at 2-4; App. S; App. T]," and that even "plaintiff himself testified he intended by his words to communicate to Deputy Thrash that 'if he was smart, he should leave.' [App. O at 19-20]." App. L at 12-13 (emphasis added). Under such a record, the defense that plaintiff issued a threat or attempted to incite the crowd cannot properly be excluded from the jury.

[5] A directed verdict is proper only "if, under the governing law, there can be but one reasonable conclusion," but if "reasonable minds could differ as to the import of the evidence ... a verdict should not be directed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 91 L. Ed.2d 202, 106 S.Ct. 2505 (1986). See also Howard v. Everex Systems, Inc., 228 F.3d 1057,1060 (9th Cir. 2000)("If conflicting inferences may be drawn from the facts, the case must go to the jury.") Here the record contains testimony at least allowing "conflicting inferences" concerning

mate fact finder whenever an arrestee accompanies his illegal acts with protected speech.

In the past the Ninth Circuit had properly accepted that the existence of a threat "is a question of fact for the jury, not a question of law for the court." Melugin v. Hames, 38 F.3d 1478, 1485 (9th Cir. 1994). See also Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)(a true threat "should be considered in light of their entire factual context, including surrounding events"); United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989), cert. denied, 493 U.S. 1082 (1990)(the "fact that a threat is subtle does not make it less of a threat.") Now, in reviewing cases concerning the existence of a true threat or incitement of a crowd that is accompanied by protected speech, the Ninth Circuit apparently relies on Gulliford to "engage[] in reweighing the evidence and making its own finding of the likelihood that [an ar-

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probable cause, see supra n. 4, and unless two juries, two district court judges and one out of three appellate judges on that same panel who differed with the majority all lacked "reasonable minds," as a matter of law the verdict was improperly directed. Such a departure from the proper appellate function itself calls for this Court's supervisory review.

restee's] utterance and expressive conduct were not 'likely to produce imminent lawless action.'" Poocha, 2001 WL 880848 * 7 (Aug. 7, 2001)(Tashima, J., dissenting)(dissenting because "whether the words and expressive conduct [the arrestee] used at the time and in the circumstances involved were likely to incite an immediate breach of the peace is a quintesssential factual inquiry and ... the majority, in its treatment of that question, has arrogated to itself the making of that finding . . . .")

Hence the manner in which the Ninth Circuit majority reached the issue and directed liability against Deputy Thrash so far departs from the accepted and usual course of judicial proceedings -- and continues to be used to justify similar departures in other cases -- as to call for an exercise of this Court's supervisory power. See S.Ct. Rule 10 (c).

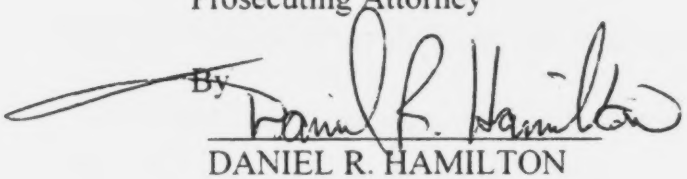
C. CONCLUSION

Only a writ of certiorari can remedy the Ninth Circuit's errors concerning these important federal questions -- and prevent their future repetition -- as well as avoid an improper appel-

late imposition of personal liability upon a police officer whom two juries, two district court judges and a circuit court judge have all found lawfully performed his duty under tense and uncertain circumstances.

DATED THIS 10TH DAY OF SEPTEMBER, 2001.

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